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**Labriola Baking Company and Juventino Silva, Petitioner and Teamsters Local 734.** Case 13–RD–089891

September 8, 2014

**DECISION AND DIRECTION OF SECOND ELECTION**

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, JOHNSON, AND SCHIFFER

The National Labor Relations Board has considered objections to an election held March 14, 2013, and the hearing officer’s report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 16 for and 20 against the Union, with 4 challenged ballots, an insufficient number to affect the results. The Board has reviewed the record in light of the exceptions and briefs, and has decided to sustain the Union’s exception and order a new election.

I.

On September 21, 2011, Teamsters Local 734 was certified as the bargaining representative for a unit of full-time and part-time sales drivers at Labriola Baking, a bakery and delivery company operating in the Chicago, Illinois area. A year later, the parties not yet having agreed to a first contract, an employee filed a petition to decertify the Union.

One week before the election, the Employer held a mandatory meeting for the drivers; roughly 25 of the 40 unit employees were present. At the meeting, Vice President and Chief Operating Officer Robert Burch spoke to employees about the upcoming election. Approximately 80 percent of the unit employees were Spanish-speaking, so the Employer had Payroll Administrator Manual Rojas translate Burch’s remarks. Following a script, Burch said: “If you chose Union Representation, we believe the Union will push you toward a strike. Should this occurs [sic], we will exercise our legal right to hire replacement workers for the drivers who strike.” Unit employees, however, testified and the hearing officer found that Rojas’ translation ended with the statement that the Employer would replace the workers with “legal workers” or a “legal workforce.” There is no evidence that the Employer made any attempt to correct or clarify Rojas’ translation, either at the meeting or afterward.

One week later, the employees voted to decertify the Union with 20 votes against representation, 16 votes for

representation, and 4 uncounted challenged ballots.<sup>1</sup> The Union timely filed objections, including, as Objection 1, its claim that Rojas’ translation was a threat to report employees to immigration authorities.

The full text of Objection 1 states:

On or about May 7, 2013, at a meeting attended by about twenty-five (25) employees, COO Burch, and Rich Labriola, Mr. Burch told employees that if they supported Local 734 in the March 14 election, Local 734 would cause the employees to engage in a strike, and the Employer would take action to hire a legal workforce. The statement constituted a threat to report employees to immigration authorities if they exercised their Section 7 rights to support 734 and/or engage in a strike.

II.

The hearing officer concluded that the words spoken by Rojas were not objectionable because they did not expressly or impliedly threaten that the Employer would report employees to immigration authorities if they supported the Union. We find that the hearing officer failed to recognize the threat of adverse consequences these words conveyed to non-English-speaking employees, regardless of their immigration status.<sup>2</sup>

A.

The hearing officer analyzed Objection 1 only in terms of whether the Employer threatened to report employees to immigration authorities. That is an unduly restrictive reading of the Union’s objection. To be sure, the objection refers to reporting employees to immigration authorities, but it specifically sets forth Rojas’ statement that the Employer would take “action” to hire a “legal workforce.” In these circumstances, we are not precluded from considering whether the statement amounted to a more generalized threat. And, in any event, the Board may consider conduct that does not “exactly coincide with the precise wording of the objections” where, as here, that conduct is “sufficiently related” to the filed objections. *Fiber Industries*, 267 NLRB 840, 840 fn. 2 (1983). Thus, the question whether Rojas’ translation conveyed to employees that the Employer would take some kind of action against them based on their legal status is appropriately before us.

<sup>1</sup> For purposes of this case, we treat the election as a tie because, when considering election objections, the Board assumes that unopened, uncounted ballots were cast in favor of the objecting party. *Harborside Healthcare, Inc.*, 343 NLRB 906, 913 fn. 23 (2004).

<sup>2</sup> The Union also excepted to the hearing officer’s finding that the Employer did not engage in objectionable conduct by conveying the impression that bargaining was futile. We find no merit in this exception for the reasons stated by the hearing officer.

## B.

Before turning to Rojas' translation itself, we observe that there can be no dispute that the Employer is responsible for his translation of Burch's prepared remarks, having designated Rojas to perform that service. See *API Industries*, 314 NLRB 706, 706 fn. 1 (1994). The record, moreover, fully supports a finding that Rojas' statement warned that the Union would call a strike and that the Employer would respond by hiring "legal workers."<sup>3</sup> This is the credited testimony establishing what employees were told, as opposed to the account cited by our dissenting colleagues, in which the Employer simply states its legal right to hire replacement workers in the event of a strike and innocuously announces its intention to comply with the law. The credited evidence hardly constitutes a "mere mention of [the] legal requirements." With these points established, we turn to the substance of Rojas' statement.

Although it does not appear that the Board has previously considered the likely impact of the phrase "legal workers" on employees, our cases and the policies underlying them warrant a finding that Rojas' statement was objectionable. The Board has recognized that employer threats touching on employees' immigration status warrant careful scrutiny, as they are among the most likely to instill fear among employees.<sup>4</sup> In *Viracon, Inc.*, 256 NLRB 245, 246–247 (1981), for example, the Board issued a *Gissel* bargaining order based in part on the employer's threats that, if the union were certified, the employer would report employees to immigration authori-

ties and the union would not allow employees without documentation to work in the plant. The Board observed:

[These] threats would undoubtedly evoke the most intense fear, not only of employment loss, but of removal from their very homes as well.

\* \* \*

Moreover, these threats—regardless of their applicability to any employee—signaled Respondent's displeasure at union activity and the lengths to which it would go to impose retributions should employees thwart its will.

Id. at 247.

Similarly, the statement here—"we will replace you with legal workers"—was part of a threat to retaliate against employees for maintaining union representation; it was what the employer stated it intended to do when the Union "push[ed]" workers to strike.<sup>5</sup> The dissent's entire rationale rests on the assertion that the statement was not a threat. But, as our dissenting colleagues acknowledge, it is both objectionable and (where alleged) unlawful for an employer to threaten immigration-related problems for employees because they engage in union or other protected, concerted activity. In our view, that is what the Employer did in this case. By telling non-English-speaking employees that it would replace them with "legal" workers, the Employer communicated that their immigration status would be subjected to scrutiny.<sup>6</sup>

<sup>3</sup> As an example, see the following exchange between the Employer's counsel and employee Flores:

Q. BY MR. WIT: So, Mr. Flores, I want to ask you about what you say Mr. Burch said at the March 7<sup>th</sup> meeting. Because the first time you described [it], you said he said they would hire legal workers, the second time you described it you said he would contract legal labor workers. What specifically was it that Mr. Burch say?

A. I don't know if I said it bad. Like he's like you were saying, if we're going to strike, there will be a strike, we're going to hire legal workers.

Q. Isn't it that Mr. Burch said we have a legal right to hire replacement workers?

A. No, he didn't say that.

Q. He didn't say that?

A. No.

<sup>4</sup> In analyzing such statements, Board and court precedent instructs us to be mindful of the economic dependency of employees on their employer "and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); see, e.g., *Yuma Coca-Cola Bottling Co.*, 339 NLRB 67, 68–69 (2003) (relying on *Gissel* to set aside election based on the employer's postpetition statements that reinforced earlier, prepetition threat to eliminate benefits if employees selected union representation).

<sup>5</sup> Our dissenting colleagues place too much weight on the hearing officer's finding that Rojas' translation of Burch's remarks conveyed the actions the Employer would take "in the event of a strike." It is clear to us that the hearing officer's characterization of the translated statements was contextual only and not intended to be a determination of whether the statements were either a prediction or a threat. Indeed, it appears that the hearing officer did not fully entertain this important distinction. In any event, we find that the translated statement, as presented to employees, plainly was a prediction and threat. As explained, Burch's script stated: "[W]e believe the Union will push you toward a strike." Burch testified that he read the script in its entirety. The next sentence in the script, as translated, threatened to replace the employees with legal workers in response to the Union pushing employees to strike. Thus, Burch's statement, as conveyed to employees, is properly viewed as a prediction and threat. See e.g., *L.S.F. Transportation, Inc.*, 330 NLRB 1054, 1066 (2000), *enfd.* 282 F.2d 972 (7th Cir. 2002) (Employer unlawfully threatened employees by stating they "could go ahead and bring the Union in, but when we went on strike that he would bring in temporary or replacement workers to replace us.")

<sup>6</sup> We would reach the same result even if the threat were veiled or ambiguous. The Board has been clear that it will construe any ambiguity in a threatening statement against the employer making the statement. See *Unifirst Corp.*, 335 NLRB 706, 707 (2001) ("[w]here, however, ambiguous comments about striker replacement are part and parcel of a threat of retaliation for choosing union representation, as they were here, any ambiguity should be resolved against the employer"); see also *Sears Roebuck de Puerto Rico*, 284 NLRB 258, 270 fn.

Contrary to the suggestion of our dissenting colleagues, no one disputes that employers have certain obligations to ascertain the legal status of their employees and ensure compliance with the law. But the countervailing principle is equally true: it is objectionable to threaten employees that engaging in protected activity will lead to scrutiny of their immigration status. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 895–896 (1984) (even if an employer otherwise may lawfully report the presence of an undocumented worker, the employer violates the Act “when the evidence establishes that the reporting of the presence of an illegal alien employee is in retaliation for the employee’s protected union activity”); *Nortech Waste*, 336 NLRB 554, 554–555 (2001) (rejecting the employer’s assertion that it reviewed its employees’ immigration status merely to ensure its compliance with Federal immigration laws, finding instead that the employer used that review “as a smokescreen to retaliate for and to undermine the [u]nion’s election victory”).

Furthermore, in determining whether an employer’s statement was objectionable, we examine it from the perspective of a reasonable employee. See, e.g., *Lancaster Care Center, L.L.C.*, 338 NLRB 671, 672 (2002). The test is not what the speaker may have meant to say, but whether his actual words would tend to interfere with employee free choice. *Id.*

Applying these principles to the facts of this case, we have little difficulty in discerning the threatening nature of Rojas’ references to “legal workers” or a “legal workforce.” First, by asserting that the Union would “push” the employees to strike and thus jeopardize their employment, the Respondent was skirting the limits of lawful persuasion. See *Unifirst Corp.*, above, 335 NLRB at 707; *L.S.F. Transportation, Inc.*, above, 330 NLRB at 1066. In that context, the import of Rojas’ references to “legal workers” was that the Employer would use immigration, i.e., “legal,” status, to take action against the employees in the event of the all but inevitable strike that the Employer claimed the Union would cause.<sup>7</sup> From the

employees’ standpoint, why else would the Employer specify “legal” workers? Certainly, the employees cannot be charged with piecing together that the Employer meant (assuming it did) for Rojas to convey the finer points of striker-replacement law. See *Lancaster Care Center*, above, 338 NLRB at 672 (“reasonable employee” standard does not obligate the employee to “divine a legitimate gloss to what was said”); *Sears Roebuck de Puerto Rico*, above, 284 NLRB at 270 fn. 17 (holding employer responsible for ambiguous statements to employees who “are neither law professors nor grammarians”).

For those reasons, we find that the facts of this case warrant finding that Rojas’ statements were objectionable. The Board will set aside an election if objectionable conduct has the tendency to interfere with the employees’ freedom of choice. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001). Here, the objectionable statement was highly coercive and widely disseminated at a captive audience meeting held shortly before a close election. In those circumstances, we find that the threat interfered with employees’ freedom of choice and that a second election is necessary.

### C.

Setting aside the election is also important to ensure public confidence in the Board’s ability and willingness to make the Act meaningful to all participants in the work force, which has become increasingly diverse in national origin and ethnicity. The Board must continue to fine tune its institutional “ear” in order to protect vulnerable workers from immigration-related threats and manipulation that violate the Act.

At the same time, we agree with our colleagues that some imprecision inevitably arises when communicating complex issues in multiple languages. This is particularly true when communications are walking the fine line between lawful descriptions and unlawful threats. We disagree, though, that employers should be granted greater latitude in addressing non-English-speaking workers. Both the traditional principles for analyzing threats and our obligation to be mindful of the status and concerns of vulnerable workers inform our view that these statements deserve careful scrutiny. Here, the mis-translation of the statement that the Employer would hire replacement workers when the Union “push[ed]” employees to strike signaled to a majority of the unit that

17 (1987) (setting aside election based on employer agent’s suggestion that the employer would close the facility if employees voted for union representation; “assuming, arguendo, that there is some ambiguity lurking in the statement, the Employer is liable for the double entendre . . .”).

<sup>7</sup> It is irrelevant to our analysis whether any of the employees in fact were themselves undocumented or had immigration-related problems. As one court of appeals has explained, even documented workers may be intimidated by threatened scrutiny of their immigration status, for they “may fear that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends; similarly, new legal residents or citizens may feel intimidated by the prospect of having their immigration history examined in a public proceeding.” *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004), cert. denied 544 U.S. 905 (2005).

employees' immigration status and employment could be jeopardized if they retained union representation. We find that this statement is objectionable conduct warranting a new election.

#### DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Teamsters Local 734.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be

grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. September 8, 2014

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

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Nancy Schiffer, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

MEMBERS MISCIMARRA and JOHNSON, concurring in part and dissenting in part.

Our colleagues here find that an employer engages in objectionable conduct by saying it will do something "legal." Specifically, the majority invalidates an election solely because the Employer stated that, in the event of a strike, it would exercise its "legal right to hire replacement workers for those . . . who strike," which a Spanish-speaking translator described as hiring "legal workers" or a "legal workforce" in the event of a strike. There is no evidence that the Employer made any statement arguably relating to the potential unlawful immigration status of its employees, that the Employer had any knowledge that any of its employees might have such unlawful status, or that immigration-related issues were a particular concern to this work force. However, our colleagues find this language constituted an objectionable threat to "take some kind of action" against employees based on their immigration status. As to this issue, there are two salient facts: (i) the employer's use of the word "legal" as described above, and (ii) participation by non-English-speaking employees in the discussion.

We dissent from our colleagues' finding for three reasons. First, the allegation is contradicted by the record and by hearing officer findings that our colleagues fail to fully acknowledge. Second, the majority improperly disregards well-established principles regarding burdens of proof and related standards governing representation proceedings. Third, the majority's finding appears to

reflect an underlying, mistaken premise that it is objectionable for employers to make even the slightest reference to the legal requirement of work authorization. Here, the majority essentially maintains—paradoxically—that an employer violates the law by stating it will comply with the law.<sup>1</sup>

We do not discount the importance of Board and court cases where—unlike the situation presented here—employers are found to have violated the Act based on unlawful threats, which can include threats to cause immigration-related problems for employees.<sup>2</sup> However, nothing in the NLRA renders unlawful or objectionable every mention of immigration-related work requirements. After all, employers and employees alike are *required to comply* with these legal requirements. Without more than exists in this case, the mere mention of such legal requirements (even *if* that occurred here, which is far from clear) cannot be reasonably found objectionable or unlawful.<sup>3</sup>

Our colleagues have an admirable objective, and we agree that the Act should be “meaningful to all participants in the workforce, which has become increasingly diverse in national origin and ethnicity.” It is also true that undocumented aliens who lack the work authorization required under federal law face vulnerabilities regarding their legal status. But here, the majority allows its well-intentioned general concerns to carry the day, despite the shortcomings of the Union’s objection, by overturning the outcome of a Board-conducted election when there is virtually no evidence of immigration-related concerns, apart from the mere use of the word “legal” in the presence of non-English-speaking employees. In our view, this goes well beyond “fine-tun[ing]” the Board’s “institutional ‘ear’ in order to protect vulnerable workers from immigration-related threats and ma-

nipulation that violate the Act,” as our colleagues state. Obviously, some imprecision arises when communicating complex issues in multiple languages to a diverse work force. Although our colleagues generally agree with this observation, they nonetheless brush it aside in favor of applying a rigid test of linguistic purity that the Board itself failed: the Spanish-speaking interpreter at the hearing before a Board hearing officer confused the same concepts giving rise to the controversy in this case.<sup>4</sup>

Most of the facts are undisputed. The Employer operates a bakery and employs, among others, approximately 40 drivers, who participated in a Board-conducted decertification election. The Union lost the election by a vote of 20 to 16, with 4 nondeterminative challenged ballots. During a meeting prior to the election, Employer Vice President and Chief Operating Officer Robert Burch read from a written script that stated in part: “If you chose Union Representation we believe the Union will push you towards a strike. Should this occurs [sic], *we will exercise our legal right to hire replacement workers for those drivers who strike.*” Because roughly 80 percent of the drivers spoke Spanish, a Spanish-speaking payroll administrator, Manuel Rojas, served as Burch’s translator.

After the election, the Union filed objections seeking to invalidate the election results. Objection 1 related to the manner in which the above statement was translated. According to the objection, “Mr. Burch told employees that if they supported Local 734 in the March 14 election, Local 734 would cause the employees to engage in a strike, and the Employer would take action to hire a *legal workforce*” (emphasis added). The Union’s objection continues: “The statement constitutes *a threat to report employees to immigration authorities* if they exercised their Section 7 rights to support [the Union] and/or engage in a strike” (emphasis added).

The hearing officer carefully analyzed the testimony of multiple witnesses, who variously described how the “legal right to hire replacement workers” phrase was translated. Considering the evidence in the “best light” for the Union, the hearing officer determined that the translated statement was not objectionable. The hearing officer stated: “Through Rojas, Burch indicated that the Employer would hire ‘legal’ workers as replacements.” The hearing officer reasoned that the translated remarks

<sup>1</sup> Because the instant case involves the Board’s review of election objections, the majority finds that the word “legal” constitutes objectionable conduct (to a degree that warrants overturning the Board-conducted election), and our colleagues do not specifically address whether the conduct violates the Act. However, if the same facts arose in a case involving alleged unfair labor practices, our colleagues’ analysis suggests they would find that similar conduct would constitute unlawful restraint, coercion, or interference with protected rights in violation of Sec. 8(a)(1) of the Act.

<sup>2</sup> See, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984); *North Hills Office Services*, 346 NLRB 1099, 1102 (2006). Cf. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

<sup>3</sup> The Union filed exceptions to the hearing officer’s recommendations to overrule Objections 1 and 3. Although we dissent from our colleagues’ finding that the hearing officer improperly overruled Objection 1 (dealing with the statement about “legal” replacement workers in the event of a strike), we join our colleagues in affirming the hearing officer’s recommendation to overrule Objection 3, which, as alleged by the Union, involved conveying the impression that bargaining was futile.

<sup>4</sup> Our colleagues state that they disagree “that employers should be granted greater latitude in addressing non-English speaking workers.” We have not advocated any different standard that would apply when employees have a primary language other than English. To the contrary, our colleagues adopt a different rule pertaining to words and phrases that, in the majority’s view, cannot lawfully be used around Spanish-speaking employees.

“do not amount to a threat to report employees to immigration authorities if they supported the Union or engaged in a strike.” In agreement with the Employer, the hearing officer indicated the remarks contained “no express or implied threat to report employees to immigration.”

The hearing officer stated it was plausible that Rojas (the translator) “could have converted ‘legal right to hire replacement workers’ to ‘legal workforce’ or ‘legal workers’ during his contemporaneous translation of Burch’s remarks.” Indeed, the hearing officer explained that, at the hearing, “the Board interpreter also experienced difficulty distinguishing the concepts during [the] testimony.” Although the hearing officer concluded that Rojas “referred to ‘legal workers’ or a ‘legal workforce,’” she specifically found “this reference was made *in the context of what action the Employer would take in the event that the Union went on strike*” (emphasis added).<sup>5</sup>

The record contains not a shred of evidence suggesting that any employees lacked work authorization, that they feared being reported to immigration authorities, or that some other type of immigration-related issues or problems existed in the workplace. The only potential basis for inferring the existence of immigration-related fears—an inference drawn by our colleagues—is the participation by Spanish-speaking employees in the meeting.

In these circumstances, we believe that neither facts nor logic support a finding that the Employer engaged in objectionable conduct by accurately describing what it would do in the event of a strike—i.e., that it would exercise its “legal right to hire replacement workers,” translated as hiring a “legal workforce” or “legal workers.” Indeed, given that the translation of the Employer’s remarks referred to *who would be hired* in the event of a strike—i.e., “legal workers” or a “legal workforce”—we do not understand how this could reasonably be interpreted as a threat to “report” current employees to anyone.

Nonetheless, our colleagues find the Employer’s statement objectionable based on their view of the “likely impact” of the phrase “legal workers” on employees. Here, the majority begins by substituting a different ob-

jection for the one the Union filed. The Union alleged that the Employer threatened to “report employees to immigration authorities . . . .” The majority, however, expands and reinterprets this specific allegation into a claim that the Employer threatened to “take some kind of action against [employees] based on their legal status.” As to this expanded version of the Union objection, our colleagues then conclude it is reasonable for employees to regard the phrase “legal workers” as meaning that “the Employer would use immigration . . . to take action” against them. Notwithstanding the hearing officer’s specific finding that the Employer’s remarks were “made in the context of what action the Employer would take in the event that the Union went on strike,” our colleagues maintain that, from the standpoint of employees, the Employer would only logically use the phrase “legal workers” to threaten employees with immigration-related actions.<sup>6</sup> Again disregarding the hearing officer’s specific finding about context (i.e., the fact that the Employer was explaining who it would hire in the event of a strike), our colleagues reason that “employees cannot be charged with piecing together that the Employer meant . . . to convey the finer points of striker-replacement law.” Yet, our colleagues at the same time indicate that the Employer’s remarks improperly warned employees about the “inevitabil[ity]” of a strike. Based on these and other characterizations, the majority asserts that “our cases and the policies underlying them” warrant a finding that it is *illegal* to mention the hiring of “legal” replacement employees in the event of a strike. Apparently, this illegality arises if employers use one of two prohibited phrases—“legal workers” or a “legal workforce”—when non-English-speaking employees participate in the conversation.

With due respect to the contrary view of our colleagues, we believe three considerations compel a conclusion that the record does not reasonably support a finding of objectionable conduct here, based on the mere use of the phrase “legal workers” or “legal workforce.”

First, consistent with the hearing officer’s findings, our view of this case is straightforward: (a) the Employer described (in English) its “legal” right to hire replacements in the event of a strike;<sup>7</sup> (b) this was translated

<sup>5</sup> Our colleagues find that “Rojas’ statement warned that the Union *would call a strike* and that the Employer would respond by hiring ‘legal workers’” (emphasis added), and they contrast their finding with “the account” cited by us. However, we cite the “account” credited by the hearing officer based on her careful assessment of the record “considering the evidence *in the Union’s best light*” (emphasis added). The hearing officer found that Rojas spoke of action the Employer would take “in the event of a strike.” We adopt the hearing officer’s factual finding, which is contrary to the majority’s description of Rojas’ statement.

<sup>6</sup> Our colleagues quote the “statement [at issue] here” as “we will replace you with legal workers.” The credited testimony does not contain this quotation. As explained above, the hearing officer found that Rojas converted “legal right to hire replacement workers” to “legal workforce” or “legal workers” during his contemporaneous translation of Burch’s remarks.

<sup>7</sup> There is no dispute about the English version of what the Employer stated. The Employer’s COO, Burch, read from a written “script” that he had prepared in advance. That script stated that, in the event of a strike, “we will exercise our legal right to hire replacement workers for

(into Spanish) as the potential hiring of “legal workers” or a “legal workforce” as striker replacements;<sup>8</sup> and (c) nothing in the record suggests that any unit employees had immigration-related problems or concerns, threatened or otherwise. We believe these conclusions are not only straightforward, they are inescapable from the record and findings by the hearing officer.<sup>9</sup>

Second, our colleagues’ finding of objectionable conduct runs counter to important, well-established principles regarding burdens of proof and other rules governing the Board’s adjudication of election objections. It is worth noting that one of the Board’s primary functions is to *give effect* to election results consistent with the em-

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those drivers who strike.” Based on the uniform testimony of multiple witnesses, with only a single exception, the hearing officer found that Burch (and his translator, Rojas) “were reading except for times when Burch was addressing employee questions.”

<sup>8</sup> Our colleagues believe this statement was an unambiguous threat, but add that they “would reach the same result even if the threat were veiled or ambiguous” by construing the ambiguity against the Employer. In our view, the statement was unambiguously *not* a threat. We do not believe the terms “legal workers” and “legal workforce” can reasonably be considered ambiguous in the circumstances presented here. However, even if considered ambiguous, it is not appropriate to “construe any ambiguity . . . against the Employer.” Unless there is a threat of retaliation, the Board’s policy is to resolve “*in the employer’s favor* any ambiguity occasioned by a failure to articulate employees’ continued employment rights when informing them about permanent replacement in the context of an economic strike.” *Unifirst Corp.*, 335 NLRB 706, 707 (2001) (citing *Eagle Comtronics, Inc.*, 263 NLRB 515, 516 (1982)). In our view, the record and the hearing officer’s findings preclude a reasonable conclusion that the “legal workers” or “legal workforce” remark was a threat of retaliation. Therefore, any ambiguity would appropriately be resolved in the Employer’s favor. *Id.* This is especially true given that the burden of proof rests upon the Union as the party seeking to overturn the election results, and the facts that multiple witnesses testified in varying ways regarding the comments, and it was clear to all employees that Rojas was providing a simultaneous Spanish translation of Burch’s comments.

<sup>9</sup> We do not believe it is proper to reinterpret and expand Objection 1, which, as submitted by the Union, alleged that the Employer threatened to “report employees to immigration authorities” in retaliation for protected activity. As noted above, our colleagues expand Objection 1 to allege a threat to “take some kind of action against [employees] based on their legal status.” At no time did the Union seek to amend its objection to include this broader allegation. Notwithstanding our colleagues’ suggestion to the contrary, it is well established that the Board will not consider objections not previously raised unless there is a showing that the different alleged misconduct was newly discovered and previously unavailable to the objecting party. See, e.g., *Tuf-Flex Glass*, 262 NLRB 445, 445 fn. 3 (1982), *enfd.* 715 F.2d 291 (7th Cir. 1983). In this regard, *Fiber Industries*, 267 NLRB 840, 840 fn. 2 (1983), relied upon by our colleagues, is readily distinguishable from the present case. There, the *petitioner* raised new allegations that the Board elected to consider even though they did not coincide precisely with the wording of the objections. *Id.* In the present case, the Union has not sought to amend its objection; rather, our colleagues have decided to expand it at their own initiative. Even in its expanded form, we believe there is no support for a finding of objectionable conduct based on the record or any reasonable interpretation of the Act.

ployees’ right of “self-organization” and the Board’s responsibility to safeguard the “fullest freedom” of employees in their exercise of protected rights.<sup>10</sup> In our view, the majority’s finding of objectionable conduct does not give appropriate weight to the following principles: (i) Board elections are not lightly set aside, and the party seeking to overturn the election—in this case the Union—bears the burden of proving that objectionable conduct interfered with the results of the election (*Safe-way, Inc.*, 338 NLRB 525 (2002)); (ii) the burden placed on the party challenging election results is a “heavy” burden (*id.*); (iii) an election will not be set aside unless it is proven that objectionable conduct reasonably tended to interfere with the employees’ free and uncoerced choice (*Quest International*, 338 NLRB 856, 857 (2003); *Taylor Wharton Division*, 336 NLRB 157, 158 (2001)); and (iv) the Board’s factual findings in representation and unfair labor practice cases can be upheld on review only if they are supported by “substantial evidence.”<sup>11</sup>

These principles do not consist of empty words; they exist for important reasons, and the Board is required to adhere to them when adjudicating representation cases. We do not believe our colleagues’ finding of objectionable conduct—based on the mere utterance of the phrase “legal workers” or “legal workforce,” which multiple witnesses actually described different ways—can be squared with our requirements that the Union bears a *heavy* burden, which is to *prove* that objectionable conduct interfered with employee free choice, based on substantial evidence. As the hearing officer found, Rojas’ translation did not contain any reference to employees’ legal immigration status or to other immigration matters. Nor is there any evidence that even remotely suggests immigration concerns even existed among the unit employees, let alone had any bearing on employee support for the Union. Finally, Rojas’s translation occurred against a backdrop that was devoid of any objectionable or unlawful conduct, let alone any objectionable or unlawful conduct related to employees’ immigration status.<sup>12</sup>

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<sup>10</sup> See Secs. 7 and 9(b).

<sup>11</sup> Sec. 10(e) (“The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.”).

<sup>12</sup> Although the majority suggests that the Employer’s comments constituted a warning to employees about the alleged “inevitability” of a strike, there was no allegation or objection in this case based on a claim that the Employer asserted strikes were inevitable or that the Union would “push” the employees to strike.” Our cases establish that an employer’s statement about a potential strike and its right to replace striking employees, “should this occur,” is a lawful prediction about the consequences of union representation and not, as the majority states, a threat of retaliation. See, e.g., *Eagle Comtronics, Inc.*, 263 NLRB 515

Third, our colleagues' finding of objectionable conduct appears to suggest that employers violate the Act or engage in objectionable conduct if they make the slightest reference to the legal requirement of work authorization, at least in the presence of non-English-speaking employees. We agree that it is highly objectionable and unlawful for an employer to threaten or cause immigration-related problems for employees because they engage in union or other protected concerted activity. But this is not such a case. The decisions relied upon by the Union—all reasonably distinguished by the hearing officer—involved threatened retaliation that was directly linked to the employees' immigration status.<sup>13</sup> Here, by comparison, the hearing officer found there was a plausible explanation for the use of the phrase “legal workers” or “legal workforce” (i.e., that it was a rough translation of the employer's description of the “legal” right to hire replacement employees in the event of a strike).<sup>14</sup> Even without such an explanation, there is no evidence that the Employer threatened existing employees when using the term “legal” to describe *other* people who would be hired “in the event that the Union went on strike.”

It bears emphasis that nobody contends that the Employer here threatened, in the event of a strike, to hire “illegal” workers or an “illegal” work force. Such a

statement might violate Section 8(a)(1), for example, if an employer threatened to retaliate against striking employees by replacing them with lower-paid undocumented employees who lacked work authorization. By comparison, the instant case deals with the Employer's indication that it would hire “legal” workers or a “legal” work force in the event of a strike. If a party announces its intention to engage in conduct that is “legal,” the Board cannot reasonably find this constitutes an objectionable or unlawful threat without some reasonable support in the record, or the law, for such a counterintuitive proposition. Neither type of support exists in the circumstances presented here. Thus, the majority's underlying premise boils down to a speech prohibition: in effect, our colleagues find that it is objectionable or unlawful for an employer to tell employees it will comply with the law. Such a finding undermines well-established principles of free speech, which protect the right of parties to express “views,” “argument” and “opinion,” where such expressions contain no threat of reprisal.<sup>15</sup> For the reasons stated previously, the record here does not support any reasonable inference that the Employer's statements constituted such a threat.

The Board has an eventful and uneven history of dealing with immigration-related requirements. In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), the Supreme Court upheld the Board's position that undocumented aliens were “employees” under the Act, with protection against unlawful retaliation based on protected activity, even if they failed to satisfy the requirements of the Immigration and Nationality Act (INA). In *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), the Supreme Court rejected the Board's position that it could require backpay for undocumented aliens who never obtained work authorization as required by the Immigration Reform and Control Act (IRCA). Other cases involve disputes when the Board has prevented parties from seeking or introducing evidence regarding the lack of work authorization. See, e.g., *NLRB v. Domsey Trading Corp.*, 636 F.3d 33 (2d Cir. 2011); *Flaum Appetizing Corp.*, 357 NLRB No. 162 (2011) (majority opinion by Chairman Pearce and Member Becker; dissenting opinion by Member Hayes). All of these decisions clearly

(1982) (prediction about consequences of union representation protected by Sec. 8(c) absent threat of reprisal or force or promise of benefits).

<sup>13</sup> For example, the employers' statements in *QSI, Inc.*, 346 NLRB 1117 (2006), enf. denied in part sub nom. *Smithfield Packing Co. v. NLRB*, 510 F.3d 507 (4th Cir. 2007), and *Viracon, Inc.* 256 NLRB 245 (1981), unlike the Employer's statement at issue here, were overt and pointed threats to, respectively, have employees arrested by immigration authorities and reported to immigration authorities. Similarly, the Union's reliance on *Mid-Wilshire Health Care Center*, 342 NLRB 520 (2004), is unpersuasive because the employer in that case, unlike the Employer here, explicitly told an employee that it knew that she did not have papers in order to coerce her into signing a decertification petition. In *Unifirst Corp.*, 335 NLRB at 707, and *L.S.F. Transportation, Inc.*, 330 NLRB 1054, 1066 (2000), enf. 282 F.3d 972 (7th Cir. 2002), the employers threatened that they would encourage or even cause a strike, and in *Sears Roebuck de Puerto Rico*, 284 NLRB 258, 270 fn. 17 (1984), the employer issued “an obvious, objectionable threat” to close the facility. No similar allegations or circumstances are present here. Likewise, because the Employer's action here clearly was not a “smokescreen” designed to mask retaliatory intent, *Nortech Waste*, 336 NLRB 554, 554–555 (2001), is clearly distinguishable from the present case.

<sup>14</sup> We note also that there are legal obligations related to hiring *any* kind of employee, including strike replacements, that have nothing to do with immigration law or status and are independent of the Act. E.g., *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983). Thus, hiring a “legal workforce” is not solely referable to immigration issues or labor issues.

<sup>15</sup> Although Sec. 8(c) makes reference only to unfair labor practice cases, “the strictures of the First Amendment . . . must be considered in all cases.” *Allegheny Ludlum Corp.*, 333 NLRB 734, 737 fn. 20 (2001), enf. 301 F.3d 167 (3d Cir. 2002).



reflect two things: (i) federal law imposes immigration and work authorization requirements on employers and employees alike; (ii) the existence of these requirements is no secret.<sup>16</sup> The mention of one's intention to *comply* with such requirements—for example, in a phrase such as “legal workers” or “legal workforce”—cannot reasonably be found to violate federal law.

For these reasons, we respectfully dissent from our colleagues' finding of objectionable conduct regarding

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<sup>16</sup> Indeed, a prerequisite to any individual's employment is proof of citizenship or valid work authorization, which must be reflected in written I-9 Forms retained by the employer. See, e.g., 8 CFR § 274a.2(a)(2).

use of the phrase “legal workers” or “legal workforce” (Objection 1).

Dated, Washington, D.C. September 8, 2014

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Philip A. Miscimarra, Member

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Harry I. Johnson, III, Member

NATIONAL LABOR RELATIONS BOARD